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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PATRICK H. EATHERLY and wife,
MARY FRANCES EATHERLY,
Petitioners,

v.

SMITH COUNTY, TENNESSEE,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Tennessee

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PETITION FOR A WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

Whether the Petitioners were afforded the guarantees provided under the Fifth Amendment of the United States Constitution which prohibits private property being taken for public use without due process of law and without just compensation being given therefor.

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Petition for a Writ of Certiorari to the Supreme Court of the State of Tennessee

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners seek review of the decision of the Supreme Court of the State of Tennessee which denied the Petitioners' Petition for Permission to Appeal to the Tennessee Supreme Court the decision of the Court of Appeals of Tennessee which affirmed the judgment rendered in the Circuit Court of Smith County, Tennessee. The Circuit Court awarded the Petitioners the sum of $98,000.00 as compensation for property taken through a condemnation proceeding. Petitioners, among other issues, raised the constitutional question of due process and just compensation in the Circuit Court, in the Tennessee Court of Appeals and in their petition for Permission to Appeal to the Supreme Court of Tennessee.

OPINION BELOW

The opinion of the Court of Appeals of Tennessee (reproduced at Appendix 1a) (hereinafter "A"), issued on July 26, 1991. The Court of Appeals of Tennessee addresses the constitutional issue at pp. 4-5 of the opinion. The Order of the Supreme Court of Tennessee denying the Petition For Permission to Appeal (reproduced at A 7a), issued on December 2, 1991).

JURISDICTION

The Order of the Supreme Court of Tennessee denying Permission to Appeal was entered on December 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

THE CONSTITUTIONAL AMENDMENT INVOLVED

The Fifth Amendment to the Constitution of the United States which provides in part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The Supreme Court of the State of Tennessee denied the Petitioners Application For Permission to Appeal the adverse decision of the Court of Appeals of Tennessee affirming the trial court, the Smith County, Tennessee, Circuit Court. Petitioners seek review of the rulings of the court and the process utilized in arriving at the decision.

The Circuit Court had this to say in ruling on the admissibility of the minutes of the County Commission which raised the issue of due process and just compensation.

> "Now if you can show the Court where any county commissioner voted not to pay this landowner or any

> landowner in this County just compensation for any property taken, I'll allow you to put it in."

The Circuit Court did not permit the introduction of the evidence.

On appeal to the Court of Appeals of Tennessee that court disposed of the question of just compensation by holding that evidence concerning the amount the County decided to pay into Court is irrelevant in a condemnation proceeding, citing *Clinton Livestock Auction Company v. City of Knoxville*, 376 S.W.2d 743 (Tenn. Ct. App. 1963), and Tennessee Code Annotated, Title 29-17-701(b) (reproduced at A 8a). Section 701 (b) provides in part that such payment to the property owner or into Court shall in nowise limit or fix the amount to be allowed under subsequent proceedings in said case.

A. Factual Background

The litigation commenced in the Circuit Court of Smith County, Tennessee, with the filing of a condemnation action by Smith County, Tennessee, to condemn a tract of land owned by Petitioners, Patrick H. Eatherly and wife, Mary Frances Eatherly, to be used by Smith County as the site of a solid waste landfill.

Paragraph 7 of the complaint alleged as follows:

> "Pursuant to the provisions of Tennessee Code Annotated 29-17-802, Petitioner has determined the amount of damages to which the Defendants are entitled because of the taking by Petitioner of said property rights and, accordingly has deposited said amount with the Clerk of the Circuit Court simultaneously with the filing of this Petition by making a formal Tender."

Smith County deposited with the Clerk of the court the sum of $118,000.00, arriving at the amount as being the lesser of two appraisals made for it by Bill Floyd and Billy Eastes, both later testifying for Smith County at the trial.

Bill Floyd and Billy Eastes, had appraised the property and valued it, as shown by the Minutes of the Smith County Commission, the county's legislative governing body, at $118,000.00 and $123,650.00, respectively. It was upon this basis that the county made the tender of $118,000.00 into Court. At the trial they testified the value to be $75,000.00 and $80,000.00 respectively.

The Petitioners attempted to introduce a certified copy of the Minutes of the County Commission through the testimony of the Smith County Clerk, custodian of County records, wherein the matter of the condemnation of the property was considered and the opinions of value of the two expert witnesses, Bill Floyd and Billy Eastes, of the County were put in record. The trial court refused to permit the minutes to be entered into the record and the consideration of same by the jury. The County Commission had nine pages of official Minutes in the discussion and the representation of appraised value made by Eastes and Floyd are contained therein.

It was Petitioners position the County Commission, in open Session, authorized the filing of the condemnation and set the fair market value of the land at $118,000.00 based on representation of the two appraisers; by doing so the value placed on the property by Smith County had been fixed and to let the two appraisers change their appraisals at trial constituted a violation of the Fifth Amendment of the Constitution in that it violated both due process and taking of property without just compensation.

B. Proceedings Below

At trial, verdict in the Circuit Court was for $98,-600.00. Judgment was entered thereon. The Court of Appeals affirmed. The Supreme Court denied Permission to Appeal. The Constitutional issues of just compensation and due process were raised in all three Courts, but only considered briefly in the Tennessee Court of Appeals.

REASONS FOR GRANTING THE PETITION

This case presents an important issue of Constitutional law regarding the rights of landowners when private property is appropriated for public purposes; the degree of responsibility and accountability required by the condemning authority to its citizens to assure that the rights of due process and just compensation granted under the Constitution of the state and of the United States are adequately protected. It also presents the equally important issue of the applicability of a statute that contravenes the United States Constitution.

Clearly the state courts have not afforded Petitioners the protection required by the Constitution and the decision of the courts should not be allowed to stand.

I. THE DECISIONS BELOW IGNORE THE RESPONSIBILITY OF THE CONDEMNING AUTHORITY TO ADEQUATELY PROTECT THE CITIZEN LANDOWNERS.

The acquisition of this property by the condemning authority was accomplished through local funding without financial assistance by a loan, grant or contribution provided by the United States. Therefore, Title III of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 as amended by the Uniform Relocation Act Amendments of 1987 (23 U.S.C.A. Sec. 301 *et seq.*) does not apply.

The decisions of the lower courts have to be sustained by the holdings of two Tennessee cases, *Catlett, et al. v. State of Tennessee, etc.*, 336 S.W.2d 8 (Tenn. 1960) and *Clinton Livestock Auction Company v. City of Knoxville, supra*, and of Tennessee Code Annotated, Title 29-27-701(b).

In *Catlett v. State of Tennessee*, the State of Tennessee brought action to condemn certain lands belonging to Catlett for highway purposes. The contest concerned the

method of payment for the land by the State and the constitutionality of the Act of the Tennessee General Assembly providing for the condemnation of land was challenged. The Act provided the condemner shall determine the amount of damages to which the landowners is entitled and deposit the amount with the Clerk of the Court in which the proceeding is filed.

The Act further provided if the amount deposited was acceptable to the landowner the amount may be taken and decree entered. If the amount is unacceptable, the landowners may except and have a trial by jury.

The *Catlett* court found this procedure acceptable and complied with the due process requirement. In its holding, the court said:

> "The amount deposited by the condemners is an amount that is judged by his appraisers to be the value under the formula set forth in Section 10 [of the Act], above referred to. When this comes to trial before the jury, naturally the condemner is going to use appraisers to try to establish that the value at less value while the property owner or landowner is going to use various appraisers to try to show an increased valuation. All this amounts to is purely a question of evidence. What the condemner deposits in court does not fix the damages any way in the world. It is purely what his side of the lawsuit testifies as to what he thinks the land is worth . . . ."

Clinton Livestock Auction Company v. City of Knoxville, supra, also was a condemnation action case. The condemning authority deposited with the Clerk of the Court the amount it determined the owner is entitled pursuant to Tennessee Code Annotated Title 29-17-702(a).[1] The case resulted in a verdict for $428.00 less

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[1] Tennessee Code Annotated Title 29-17-701(a) provides in part the condemners may deposit with the Clerk of the Court at the time of the filing of the Condemnations such amount as it shall determine the owner is entitled.

than the amount the condemner paid into court. The landowners appealed alleging (1) the Complaint averred that the condemner had paid into court the amount it had determined the landowner was entitled to ($6,428.00); (2) The condemner was now estopped from denying that the amount as the value of the property, and (3) evidence of the amount paid into court and who made the appraisal upon which it was based should have been admitted into the record.

The appeals court affirmed the lower court citing *Catlett v. State of Tennessee* as authority. The Tennessee Supreme Court denied certiorari.[2]

We submit the instant case can be distinguished from *Clinton Livestock Auction Company v. City of Knoxville, supra.* In the present case, the Smith County Commissioners had two figures before them when the vote was taken to condemn the property. Those figures were $118,000.00 and $123,650.00 and the figures were made available to the Commissioners by two of the appraisers who later testified at the trial that the value of the property was $75,000.00 and $80,000.00, respectively.

In the *Clinton* case there was a difference of $428.00 in the amount tendered into court and the amount awarded at trial. The record does not disclose who made the appraisals for the City of Knoxville. In the instant case appraisers Floyd and Eastes made two appraisals. The law is clear as to when fair market value is determined.

In the instant case there are thousands of dollars involved and having two appraisers who made the appraisals for the condemning authority in 1988 to come into Court and give completely different testimony does not meet the Constitutional requirement.[3]

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[2] At the time of the appeal, the Petition for a Writ of Certiorari was the method of appeal to the Tennessee Supreme Court. This was later changed to an Application for Permission to Appeal.

[3] The representations of the appraisers were made to the County Commissioners on October 31, 1988. The action was filed on Novem-

In the case of *United States v. Miller*, 317 U.S. 369 (1943) the Court said:

> "The Fifth Amendment of the Constitution provides that private property may not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The Owner is to be put in as good pecuniary position as he would have occupied if his property had not been taken."

It is respectfully submitted that a local government has the highest degree of responsibility to its citizens. The right of eminent domain cannot be used in such manner as to lessen that responsibility. The petitioners property did not decrease in value fifty percent in fifteen months as the County's appraisers would have the jury believe. Had all the proof the Petitioners sought to have introduced before the jury been admitted, under proper instructions, the jury could have weighed all the facts.

The Constitutional requirements of due process and just compensation to the landowner must be carefully guarded by the courts. We respectfully submit that be done in this case.

The Tessessee Court of Appeals also cited Tenn. Code Annotated Title 29-17-701(b), *supra*, which provides in part that payment of deposit into the registry of the Court shall in no wise limit or fix the amount to be allowed under subsequent privileges in the case.

It is well settled that the event of a conflict between a statute and a Constitutional requirement, the Constitution controls.

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ber 9, 1988. The Order of Taking was entered on November 9, 1988. The case was tried on January 24, 1990. Under Tennessee law the fair market value is determined as of the date of appropriation. *Alloway v. Nashville*, 13 S.W. 123 (Tenn. 1890).

II. THE DECISIONS BELOW WARRANT IMMEDIATE REVIEW TO PROVIDE THE LANDOWNER THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND JUST COMPENSATION.

The ownership of property by individuals has always been a guarded right. The protection of individual rights have always been guarded by the court. Ownership of land by the citizens has been one of the ingredients that has made our nation a great Nation and one that has given individuals the initiative to achieve greater goals. The courts must zealously guard these rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX

IN THE COURT OF APPEALS
OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

Smith Circuit No. 2848

Appeal No. 01-A-01-9007-CV-00237

SMITH COUNTY, TENNESSEE,
Plaintiff/Appellee,

VS.

PATRICK H. EATHERLY, *et ux.*,
MARY FRANCES EATHERLY,
Defendants/Appellants.

Appeal from the Circuit Court
for Smith County, Tennessee
at Carthage

THE HONORABLE BOBBY CAPERS, JUDGE

[Filed Jul. 26, 1991]

Attorney for Plaintiff/Appellee:

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AFFIRMED AND REMANDED

WILLIAM C. KOCH, JR.
Judge

OPINION

This appeal arises from Smith County's condemnation of property needed for a new landfill. The property owners requested a jury trial on the issue of damages, and a jury in the Circuit Court for Smith County awarded them $98,600. The property owners have appealed, taking issue with the evidentiary foundation of the jury's verdict and with the trial court's exclusion of portions of their proof concerning the value of the property.[1] We affirm the judgment.

I.

In the late 1980's, the Smith County Commissioners determined that the county was in need of a new landfill and appointed a special committee to search for possible landfill sites. The committee eventually recommended a 42.71-acre tract of undeveloped farmland owned by Patrick and Mary Frances Eatherly. The property was located less than a mile from the Carthage city limits and was considered suitable for a landfill because it contained both a clay liner and a considerable amount of excess dirt.

In October, 1988, the county commissioners voted to condemn the Eatherlys' property and, on the advice of their appraisers, determined that just compensation for the property was $118,000. The county attorney filed the condemnation petition in November, 1988 and made a formal tender of $118,000 into court. The Eatherlys did not contest the county's right to condemn the property and entered into an agreement allowing the county immediate possession of the property. They did not, however, agree to accept $118,000 for the property and demanded a jury trial on the question of damages.

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[1] The appellants' brief does not contain the statement of the issues presented for review required by Tenn. R. App. P. 27(a)(4). Instead, it discusses five "assignments of error." Assignments of error were abolished twelve years ago. *See* Tenn. R. App. P. 3(h).

The proof at trial concerning the fair market value of the property was in conflict. Mr. Eatherly testified that the property was worth $4,100 per acre or $175,111 and presented three other expert witnesses who testified that the property was worth from $130,000 to $170,000. The county, on the other hand, produced three expert witnesses who testified that the property's fair market value was between $75,000 and $80,000. The jury returned a verdict for the Eatherlys in the amount of $98,600.

II.

Initially, the Eatherlys take issue with the trial court's refusal to permit them to qualify two county officials as experts in order to elicit their opinions concerning the value of the property. The trial court had broad discretion concerning the qualification of expert witnesses and their testimony, *Shelby County v. Barden*, 527 S.W.2d 124, 131 (Tenn. 1975); *State ex rel. Comm'r, Dept. of Transp. v. Veglio*, 786 S.W.2d 944, 947-48 (Tenn. Ct. App. 1989). *State ex rel. Dep't of Transp. v. Brevard*, 545 S.W.2d 431, 436-37 (Tenn. Ct. App. 1976), and did not abuse its discretion in this case.

The Eatherlys attempted to call Mr. Leslie Proffitt, a county commissioner and chairman of the solid waste disposal committee, and Mr. C.E. Hackett, the county executive, to give their expert opinions concerning the value of the property. However, both men equivocated concerning their ability to give an expert opinion about the property's value. Mr. Proffitt testified that he was "not really sure" he could give an opinion concerning the value of the property being condemned. Similarly, Mr. Hackett testified that he could not "necessarily" give an opinion concerning the value of property in Smith County in general or the property being condemned in particular.

A trial court may properly decline to qualify a witness as a valuation expert when the witness concedes a lack

of expertise in the field of real estate values. *Brookside Mills, Inc. v. Moulton*, 55 Tenn. App. 643, 653-54, 404 S.W.2d 258, 264 (1965). This is precisely what happened in this case. Both Mr. Hackett and Mr. Proffitt disclaimed any expertise concerning the valuation of real property. Accordingly the trial court did not err by ruling that they could not give an expert opinion concerning the fair market value of the property being condemned.

III.

The Eatherlys also insist that the trial court erred by refusing to permit them to introduce into evidence the minutes of the October, 1988 meeting when the county commission decided to condemn the property. They explained at trial that this evidence was relevant because it "involves the Constitutional right of the defendants to have just compensation for their property."

The minutes, which were tendered in an offer of proof, reveal that twenty-two of the twenty-five county commissioners conducted a lengthy meeting on October 31, 1988, for the purpose of selecting a new landfill site. After considering several possible locations, they selected the Eatherlys' property by a 15 to 7 vote. They were informed that Mr. Eatherly had purchased the property for $59,000 and that he was willing to sell it to the county for $175,070. They were also informed that the two local realtors retained by the county had appraised the property for $118,000 and $123,650. Even though they were concerned about the cost of the land, the county commission eventually directed the county attorney to make a formal tender of $118,000.

The two realtors retained by the county were called at trial and gave opinions concerning the value of the property that were lower than the appraisals they had given to the county commission in December, 1988. The Eatherlys' attorney cross-examined one of the realtors concerning the difference between his two appraisals but

never brought up the issue with the second realtor and never sought to put on rebuttal proof concerning the difference between their appraisals.

Evidence concerning the amount the county decided to pay into court is irrelevant in a condemnation proceeding. *Clinton Livestock Auction Co. v. City of Knoxville*, 52 Tenn. App. 614, 617-18, 376 S.W.2d 743, 744-45 (1963); Tenn. Code Ann. § 29-17-701(b) (1980).[2] Trial courts have wide latitude to control the admission of valuation evidence in condemnation proceedings. *State v. Rascoe*, 181 Tenn. 43, 56, 178 S.W.2d 392, 397 (1944). We find no basis for disagreeing with the trial court's conclusion that the county commission's deliberations concerning the details of the condemnation of the property were not relevant.

IV.

As a final matter, the Eatherlys contend that the jury's verdict is contrary to the weight of the evidence and is so low that it indicates the jury's passion, prejudice, or caprice. We disagree.

Appellate courts do not re-weigh the evidence when a party challenges the evidentiary support for a verdict. We take the strongest legitimate view of the evidence favoring the prevailing party, discard all contrary evidence, and allow all reasonable inferences to uphold the jury's verdict, *Haga v. Blanc & West Lumber Co., Inc.*, 666 S.W.2d 61, 63 (Tenn. 1984); *Crabtree Masonry Co., Inc. v. C. & R. Constr., Inc.*, 575 S.W.2d 4, 5 (Tenn. 1978), and will only set aside a jury's verdict when there is no material evidence to support it. *See* Tenn. R. App. P. 13(d).

This record contains material evidence supporting the jury's verdict awarding the Eatherlys $98,600 for their

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[2] Tenn. Code Ann. § 29-17-701(b) provides, in part, that "[s]uch payment to the property owner or into court shall in nowise limit or fix the amount to be allowed under subsequent proceedings in said case."

property. The property was not within the Carthage city limits and was not adjacent to the interstate highway or other public roads. It did not have public water or sewer lines and was only accessible by a gravel road. The opinions concerning the property's fair market value ranged from $1,750 per acre to $4,100 per acre. Several witnesses testified, however, that they knew of no property in Smith County that had sold for $4,100 per acre and that the highest price they had heard of was $3,100 per acre. The jury valued the property at approximately $2,300 per acre, a price well within the range of testimony. Accordingly, we find that the jury's verdict was supported by the evidence.

V.

We affirm the judgment and remand the case to the trial court for whatever further proceedings are required. We also tax the costs of this appeal, jointly and severally, against Patrick H. Eatherly and Mary Frances Eatherly and their surety for which execution, if necessary, may issue.

/s/ William C. Koch, Jr.
WILLIAM C. KOCH, JR.
Judge

CONCURS:

/s/ Henry F. Todd
HENRY F. TODD
Presiding Judge

/s/ Samuel L. Lewis
SAMUEL L. LEWIS
Judge

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Smith Circuit

No. 01-A-01-9007-CV-00237

SMITH COUNTY,

Appellee,

v.

PATRICK EATHERLY, *et ux.*,

Appellants.

ORDER

[Filed Dec. 2, 1991]

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be *DENIED.*

PER CURIAM

STATUTE INVOLVED

PART 7—PAYMENTS INTO COURT

29-17-701. Payments into court at commencement of condemnation proceedings.—(a) Whenever the state of Tennessee, its counties or municipalities, institutes a condemnation proceeding in any court, under the provisions of this chapter or chapter 16 of this title, to acquire any property or property rights, such condemner may deposit with the clerk of such court at the time of the filing of the petition such amount as it shall determine that the owner is entitled to and the owner may, if he so desires, make written request to the clerk to pay to him, without prejudice to any of his rights, the sum so deposited with the clerk, and the clerk shall pay to the owner the sum so deposited, provided the owner agrees to refund the difference between such sum and the final award in the case if the final award be less than the sum so paid into court or that a judgment may be entered against him in such case for the difference.

(b) Such payment to the property owner or into court shall in nowise limit or fix the amount to be allowed under subsequent proceedings in such case, and any further or additional sum that may be finally awarded in any subsequent proceedings shall bear interest from the date of the taking of possession of the property or property rights condemned by the condemner.

(c) In any subsequent judgment the judge shall include in the judgment, in addition to the principal, interest from the date of taking possession of the property to the date of the judgment, provided, however, that no interest shall be allowed on the amount deposited with the clerk. [Acts 1957, ch. 298, § 1; 1967, ch. 20, § 1; T.C.A., § 23-1526; Acts 1981, ch. 525, §§ 1, 2.]